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Public Prosecutor v Chieng Ung Kai

HIGH COURT (SIBU) — CRIMINAL APPEAL NO 25 OF 1989
ABDUL KADIR SULAIMAN J
6 OCTOBER 1992

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Customs and Excise *— Possession of uncustomed goods — Customs officer had seized goods on suspicion that customs duties had not been paid — Accused admitted to ownership of goods — Ownership not synonymous with possession — Whether goods are uncustomed goods — Burden on prosecution to prove that goods in question are subject to customs duties — Customs Act 1967 ss 2, 11, 49, 119 & 135(1)(d)*

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The respondent and another were charged under s 135(1)(e) of the Customs Act 1967 ('the Act') but were acquitted. The public prosecutor appealed on the ground that the magistrate erred in not amending the charge to one under s 135(1)(d) of the Act since the original charge could not stand. The prosecution based its argument on the alleged admission by the respondent that the goods belonged to him.

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Held, dismissing the appeal:

(1) Ownership is not synonymous with possession. The alleged admission was made after the customs had seized the goods. By then they were already in the control of the customs and in the circumstances, the respondent before his arrival at the scene and before he made the admission as to the ownership, had already parted with the possession of them. The respondent can no longer be said to be in possession of the goods at the material time.

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(2) Before considering the presumption created by s 119 of the Act, which shifts the burden of proof to the respondent, the prosecution has to show that the goods in question are uncustomed goods and that they are subject to customs duties. Customs duties are leviable only on goods imported into or exported from Malaysia. It is not sufficient to show that the goods merely belong to the class dutiable on import or export. The prosecution would have to show that the goods in question were imported into the country or being exported out of the country. There is no such evidence in this case and no evidence of any breach of the Act or subsidiary legislation made thereunder which would make the goods uncustomed goods.

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[Bahasa Malaysia summary

Penentang dan seorang lagi telah didakwa di bawah s 135(1)(3) Akta Kastam 1967 ('Akta itu') tetapi telah dibebaskan. Pendakwa raya telah merayu atas alasan bahawa majistret telah salah apabila tidak meminda dakwaan itu kepada suatu di bawah s 135(1)(d) Akta itu memandangkan bahawa dakwaan asal tidak berkuat kuasa lagi. Pendakwa telah memdasarkan perhujahannya atas pengakuan yang dituduh oleh penentang bahawa barang-barang itu adalah kepunyaannya.

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Diputuskan, menolak rayuan itu: A

(1) Perkataan keempunyaan tidak merupakan sinonim kepada perkataan milikan. Pengakuan yang dituduh itu dibuat selepas pihak kastam telah merampas barang-barang itu. Pada masa itu barang-barang itu telah berada di bawah kuasa pihak kastam dan dalam keadaan ini, sebelum penentang sampai ketempat itu dan sebelum beliau membuat pengakuan tentang keempunyaan, beliau telah berpisah dengan milikan barang-barang itu. Penentang tidak boleh dikatakan memiliki barang-barang itu pada masa yang penting itu. B

(2) Sebelum mempertimbangkan anggapan yang ditimbulkan oleh s 119 Akta itu, yang memindahkan beban membukti kepada penentang, pihak pendakwa terpaksa menunjukkan bahawa barang-barang yang berkenaan itu adalah barang-barang yang belum dibayar duti dan tertakluk kepada duti kastam. Duti kastam hanya dikenakan keatas barang-barang yang diimpot kedalam atau diekspot dari Malaysia. Tidak memadai untuk menunjukkan bahawa barang-barang itu kepunyaan suatu kelas yang dikenakan duti apabila diimpot atau diekspot. Pihak pendakwa terpaksa menunjukkan bahawa barang-barang yang berkenaan itu telah diimpot kedalam negara atau sedang diekspot keluar dari negara. Tidak terdapat keterangan sedemikian di dalam kes ini dan tidak terdapat keterangan tentang sebarang perlanggaran Akta itu atau perundangan subsidiari yang telah dibuat dibawahnya yang akan membuat barang-barang itu barang-barang yang belum dibayar duti.] C D E

Case referred to F

1 *Ng Kim Huat v PP* [1961] MLJ 308 (refd)

Legislation referred to

Customs Act 1967 ss 2, 11, 49, 119, 135(1)(d)

Thomas Akin Jelimin (Deputy Public Prosecutor) for the appellant. G
Chew Peng Jui (*Battenberg & Talma*) for the respondent.

Cur Adv Vult

Abdul Kadir Sulaiman J: The respondent and another were charged as follows: H

That you Chieng Ung Kai and Wong Yuk King at about 9.45pm on 23 January 1986 at No 3B, Jongkong Lane, Lanang Road, Sibu were knowingly concerned in conveying uncustomed goods, to wit 6 outers × 50 cartons × 10 packets × 20 sticks of 'Dunhill' cigarettes, 3 outers × 50 cartons × 10 packets × 20 sticks of 'Benson & Hedges' cigarettes, 39 cartons × 10 packets × 20 sticks of 'Benson & Hedges' cigarettes, 180 cartons × 24 bottles × 640 ml of 'Tsingtao' beer, 94 bottles × 640 ml of 'Tsingtao' beer, 85 cartons × 24 cans × 355 ml of 'Tsingtao' beer, 122 cans × 355 ml of 'Tsingtao' beer, 75 cartons × 24 cans × 33 cl of I

A 'Heineken' beer and 274 cans × 33 cl of 'Heineken' beer on a lorry vehicle registered SB 8843 with intent to defraud of the government of the duty thereon, to wit RM24,554.29 and thereby committed an offence under s 135(1)(e) and punishable under s 135(1)(i) of Customs Act 1967.

At the end of the prosecution case, the learned magistrate acquitted and
B discharged both the accused without their defence being called.

The prosecution, not happy with the decision so made, filed an appeal in respect of the respondent. No appeal, however, was filed in respect of the other accused. Four grounds of appeal were put up. At the commencement of the hearing of the appeal, the learned deputy for the appellant, rightly conceded that as it is, the charge against the respondent cannot stand.
C However, he complains that on the evidence, the learned magistrate has erred in not amending the charge to one under s 135(1)(d) of the Customs Act 1967 ('the Act'), as is required of him by ss 158 and 173(h) of the Criminal Procedure Code (Cap 6). He based his argument on the evidence of PW6 who stated that while at the scene, in answer to his question, the
D respondent admitted that the said goods belonged to him. Such being the case, said the learned deputy, the respondent had admitted to the possession of those goods. Section 135(1)(d) of the Act states: 'Whoever knowingly ... is in possession of ... any uncustomed ... goods shall be guilty of an offence ...'

As to the question of uncustomed goods, the prosecution relies on the
E presumption created by s 119 of the Act. Firstly, on the issue of possession, ownership is not synonymous with possession. I own a house and I rent it out to a tenant. Whilst the ownership of the house is mine, possession is with the tenant. Subject to the tenancy agreement, the tenant is always entitled to quiet possession of the house. To take another example, I own
F a watch and one night a thief took it away. The possession of my watch is with the thief. Now, coming back to the matter in this appeal. According to the facts of the case, acting on information received, on 23 January 1986 at about 9.45pm, PW6 and his party of customs officers raided a place at 3B Lorong Jongkong, Lanang Road, Sibu and saw four people in the process of unloading goods from a stationary lorry bearing registration no SB 8843
G to a store nearby. On approaching, the four persons disappeared. From the lorry, the party discovered a quantity of beer and from the store a further quantity of beer and cigarettes. The said goods were accordingly seized by the customs on suspicion of non-payment of duty. At about 10.30pm or so, the respondent showed up at the scene and admitted to PW6 as to the
H ownership of the goods in question. Accordingly, all the goods were loaded into the lorry and with the respondent driving the lorry under the escort of some customs officers, the goods were taken to the nearby customs checking station. There were disputes as regards to the admission by the respondent as to the ownership of the goods in question. Accepting for one moment that the goods belonged to the respondent, it is to be noted that
I this admission as to ownership was made after the customs had seized them. By then they were already under customs control and were no longer in the control of the respondent, and by s 2(2) of the Act, they may not be removed except with the permission of the proper officer of customs. In the

circumstances, the respondent before his arrival at the scene and before he made the admission as to the ownership, had parted with the possession of them. It is my view, therefore, that the respondent can no longer be said to be in possession of the goods at the material time.

The learned deputy contends that the goods were uncustomed goods and he relies on the presumption created by s 119 of the Act which shifts the burden of proof to the respondent. With respect, before considering the effect of s 119, we need to look at the definition of 'uncustomed goods' in s 2 which means: 'goods in respect of which a breach of the provisions of this Act or of any subsidiary legislation made thereunder has been committed.'

What is the breach here? The prosecution says the breach is in not paying the duties due. The respondent was not able to show proof of payment or any other documents or receipts. I do not think that it is the intention of Parliament to enable the authority to pick on anyone in the streets found carrying any goods of a class dutiable on import or export and demand from that person to produce proof of payment of duties and failing which, to charge him in court and make him prove that he had paid the duties on those goods. Customs duties are leviable only on any goods imported into or exported from Malaysia. So, before any person can be asked to show proof of payment, there must first be evidence that the goods are being imported into the country or are at the stage of being exported out of the country. It is not sufficient merely because the goods happen to belong to the class dutiable on import or export. By s 11, customs duties are to be levied on goods 'imported into or exported from Malaysia'. Echoing what Thomson CJ said in *Ng Kim Huat v PP*,[1] particular goods can be dutiable goods at one stage, not dutiable at another and then becomes dutiable again at yet another stage. Under the Act, 'dutiable goods' means all goods subject to the payment of customs duty and on which such duty has not yet been paid. So, in the present case, before the burden of proof shifts to the respondent pursuant to s 119, there must first be evidence led by the prosecution that the goods in question are subject to customs duties. To be so, there must be evidence in this case that those goods were imported into the country. I am sorry to state that in this case, no such evidence was led by the prosecution. This offence under s 135(1)(d) or (e) of the Act is different from the offence envisaged by s 49 of the Act where it would suffice if there was evidence that the goods concerned belong to a class dutiable on import or export. The prosecution there need not prove that the goods were in fact imported or exported. So, on the first ground of appeal there is no merit at all, for at the material time the respondent was not in possession of those goods and even if there was possession, there was no evidence that the goods were uncustomed goods in the sense that the prosecution never at any time adduced any evidence as to whether the goods were either imported or exported to attract customs duties. Therefore, there is no evidence of any breach of the provisions of the Act or of any subsidiary legislation made thereunder in respect of the goods to make them uncustomed.

In the light of the concession by the learned deputy in relation to the original charge and my view on the position as regard s 135(1)(d) of the

A Act, it is no longer necessary for me to consider at length the other grounds of appeal put up by the learned deputy. The other grounds involve the issue of the break in the chain of evidence relating to the exhibits tendered during the trial in the lower court and the issue of forfeiture of the lorry under s 127 of the Act. As the prosecution is not able to establish that an offence against the Act or any regulation made thereunder has been committed, the question of forfeiture would not arise. In the circumstances, the appeal is dismissed.

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Appeal dismissed.

C Reported by Zarinah Marican

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